IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
APR 21 1976
MICHAEL RODAK, JR., CLERK

75-805

CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, a governmental agency, ERSA POSTON, in her official capacity as Chairman of the Civil Service Commission of the State of New York,

Appellants,

against

MARIE SNEAD,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF

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On February 24, 1976 this Court decided *Mathews* v. *Eldridge*, —— U.S. ——, 47 L. Ed. 2d 18, holding that due process does not require that an evidentiary hearing be held prior to termination of social security disability payments to persons who are physically or mentally disabled. This decision reaffirms appellants' view that due process does not require such a hearing in the instant case, particularly since in *Eldridge* this Court placed relevant limitations on *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), the case which the Court below considered dispositive of the hearing issue.

In *Eldridge,* as in this case, the District Court held that a prior adversary hearing was necessary "because disability determinations may involve subjective judgments based on conflicting medical and nonmedical evidence." 47 L.Ed. 2d 28. This Court specifically rejected the reasoning of the District Court, citing *Richardson* v. *Perales,* 402 U.S. 389, 404 (1971) which

> "recognized the 'reliability and probative worth of written medical reports' [and] emphasiz[ed] that while there may be 'professional disagreement with the medical conclusions' the 'specter of questionable credibility and veracity is not present.'" 47 L. Ed. at 39.

In view of the "'routine, standard, and unbiased medical reports by physician specialists' . . . concerning a subject whom they have personally examined" this Court concluded that there is less risk of error than in the circumstances presented by *Goldberg* v. *Kelly* and, therefore, less need for the adversary hearing required by that case. 47 L. Ed. 2d at 38.

This conclusion is equally applicable in the instant case where the State predicates its action upon an "informed evaluation by a neutral" medical expert. Contrast *Fuentes* v. *Shevin,* 407 U.S. 67, 83 (1972). Indeed, as a practical matter the examining physician is often in private practice and therefore has no interest in whether the employee does or does not remain on the job.

In *Eldridge,* the Court also distinguished *Goldberg* v. *Kelly* in terms of the impact of the government's action on the private interest involved. The Court concluded that insofar as that interest is the "source of income pending final administrative decision," the recipient of disability benefits is different from the welfare recipient because he has other potential sources of income. 47 L. Ed. 2d at 36.

Therefore, "the disabled worker's need is likely to be less than that of a welfare recipient" even though the delay in obtaining administrative review may exceed one year. 47 L. Ed. 2d at 37. Because of these other income sources, the Court determined that

> "there is less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action."• 47 L. Ed. 2d at 38.

The employee who is placed on leave pursuant to § 72 is likely to feel even less economic impact than the disabled worker in *Eldridge.* Thus, at the time he is placed on leave he is "entitled to draw all accumulated, unused sick leave, vacation, overtime and other time allowances standing to his credit." § 72 (1). Therefore, depending upon his length of service, he may not have to seek income from other sources while pursuing his administrative remedies. Furthermore, unlike *Eldridge,* there has never been any showing that the process of administrative appeal and review under § 72 is a lengthy one. Appellee can hardly point to her own experience since she never availed herself of her right to appeal to the Civil Service Commission. Finally, the statute provides that the employee who successfully appeals must be reinstated to his position. This relief carries with it entitlement to the amount of back wages involved.

Eldridge is also relevant because it reiterates the importance of weighing the government's interest in determining what due process requires in the context of a case where the only interest advanced was that of "conserving

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• Significantly for purposes of the instant case, *Eldridge* reaches this conclusion notwithstanding the fact that the existence of a disability presupposes an inability to earn a living.

scarce fiscal and administrative resources." 47 L. Ed. 2d at 41. The government interest in the instant case is far more critical since it involves the proper and efficient functioning of the State's agencies. This critical interest was not weighed by the Court below.

Appellee contends that the employee who has been placed on a Section 72 leave of absence is subject to automatic termination at the end of one year. This argument ignores the plain language of the relevant statute, Section 73 of the New York Civil Service Law, which provides only that the employment status "may" be terminated where the "employee has been continuously absent from and unable to perform the duties of his position for one year or more." Furthermore, even if the employee is ultimately discharged, he may still be reinstated to his position if, within one year *after the termination of disability,* he satisfies a medical examination.

Clearly the Legislature intended to solve a difficult personnel problem and, at the same time, preserve the right of the employee to come back to work. The imposition of other procedural formalities than those already provided would subvert the obvious purpose of the Legislature to remove this type of medical evaluation, which rests on an assumption that the employee is not at fault, from the type of adversarial process afforded by Section 75 of the Civil Service Law which contemplates termination (Appellee's Br., Appendix).

CONCLUSION

For the foregoing reasons, the decision below should be summarily reversed.

Dated: New York, New York, April 20, 1976.

Respectfully submitted,

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